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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 735

HARRY HARKNESS FLAGLER, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1941.

CERTIORARI GRANTED MARCH 10, 1941.

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Docket Entries

DOCKET No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appearances:

For Petitioner: JOSEPH C. WHITE, Esq., RICHARD H. WILMER, Esq.,

For Respondent: JOHN R. WHEELER, Esq.

DOCKET ENTRIES:

1938

Nov. 23—Petition received and filed. Taxpayer notified. (Fee paid.)

Nov. 23—Copy of petition served on General Counsel.

1939

Jan. 17—Answer filed by General Counsel.

Jan. 17—Request for Circuit hearing in New York City filed by General Counsel.

Jan. 20—Notice issued placing proceeding on New York City Calendar. Copy of answer and request served.

Sept. 19—Hearing set Nov. 13, 1939, New York, N. Y.

Nov. 14—Hearing had before Mr. Murdock on the merits. Submitted. Consolidated with 96066, 96236-7. Stipulation of facts filed. Briefs due in 60 days—replies due 15 days.

4 *Docket Entries*

1940

Jan. 12—Motion for extension to Jan. 28, 1940 to file brief filed by General Counsel.

Jan. 16—Notice of appearance of Richard H. Wilmer as counsel filed.

Jan. 16—Motion for leave to file attached printed brief filed by taxpayer. 1/18/40 granted.

Jan. 18—Brief filed by taxpayer.

Jan. 23—Motion for leave to file brief filed by General Counsel—brief lodged. 1/24/40 granted.

5

Jan. 24—Copy of brief served on General Counsel.

Feb. 1—Memorandum reply brief filed by General Counsel.

Feb. 6—Reply brief filed by taxpayer. 2/6/40 copy served.

May 31—Memorandum opinion rendered—Mr. Murdock, Division 3. Decision will be entered for respondent.

May 31—Decision entered—J. E. Murdock, Division 3.

Aug. 27—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

6

Aug. 27—Proof of service filed by taxpayer.

Aug. 27—Praecipe filed by taxpayer.

Aug. 27—Proof of service filed by taxpayer.

Petition

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96235

MR. HARRY HARKNESS FLAGLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:A:1-JMF:90D) dated August 25, 1938, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at Millbrook, Dutchess County, New York. The return for the period here involved was filed with the Collector for the Fourteenth District of New York.

2. The notice of deficiency (copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 25, 1938.

3. The taxes in controversy are income taxes for the calendar years 1934 and 1936 and in the amount of $20,687.23.

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

(1) Substitution as the tax basis of stock sold in 1934 and 1936 of an alleged value as of May 20, 1913,

10 *Petition*

of such stock in lieu of the tax basis reported by the petitioner which was based upon the values of such stock as of the dates it was received (April 26, 1921, and May 20, 1923) rather than as of the date of death (May 20, 1913) of the testator from whose estate it was received.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On May 20, 1913, one Henry M. Flagler, a resident
11 of St. Johns County, Florida, died testate leaving a last will and testament dated February 1, 1902 and seven codicils dated respectively February 17, 1903; April 28, 1904; January 8, 1906; April 7, 1908; December 22, 1910; January 10, 1912; and September 13, 1912; which said last will and testament and codicils thereto were duly admitted to probate in Court of County Judge in and for St. Johns County, Florida, on May 24, 1913.

(b) Item Third of said last will and testament provided as follows:

"I have been for many years investing in railroads,
12 hotel and land companies in the state of Florida, and it is my intention in the future to foster, protect and properly develop such properties, and to provide against my decease while such properties are in the processes of development and to relieve my beloved wife, hereinafter named, from the immediate cares and responsibilities of so varied and such extensive interests, I hereby declare a trust concerning all my property, both real and personal, and wheresoever situated, except what is covered by the 'Fourth' Item of this instrument, and may be necessary for the expense of administration by my executors, including court costs, to my Trustees above named, which trust shall be and continue for the length of time hereinafter by this instrument provided."

(c) Said last will and testament after providing in Item Fourth for certain relatively small bequests provided in Item Fifth thereof as follows:

> "The balance of my estate I place, according to the purpose declared in the 'Third' Item of this instrument, in the hands of my said Trustees, to be used, managed and controlled by them and their successors for the purpose of protecting, fostering, operating and developing during the life of such trust, all my Florida Properties according to the purposes indicated by the charters of the several companies, and as nearly along the lines which I have adopted, or may hereafter adopt, as may be consistent with their judgment, and discretion under the conditions which may hereafter exist. The said trust shall continue for five years from the time of my death, and if at the end of such five years the condition of the Florida East Coast Railway Company and the Florida East Coast Hotel Company (they being my Florida Railroad and hotel properties referred to) or of either of them should be such as to require financial aid from sources outside of themselves or itself, then I direct that such trust shall continue so long as either or both of such last named companies shall require such assistance, but not longer, however, than a period of five years from the termination of the above mentioned or first period of five years. It is, however, to be distinctly understood that I do not authorize the railroad of said Railway Company extended south of Miami and no power to do so is given hereby."

(d) Item Sixth of said last will and testament provided in part as follows:

> "During the existence of said trust I charge said trust estate with the payment of the following annuities and expenses and direct that the same be paid by the Trustees:
>
> "1. To my dearly beloved wife, Mary Lilly Flagler, the annual sum of One Hundred Thousand Dol-

16 lars ($100,000) payable in quarterly installments from the date of my decease; and I further direct that so much of the annual net income from said trust property over and above the said annu[illegible]y and that hereinafter by subsequent clause of this ite[illegible] provided for, as shall not be required during the extended or second period of said trust, provided for in the 'Fifth' Item of this instrument shall be paid to my said wife annually."

(e) Item Seventh of said last will and testament provided in part as follows:

17 "At the expiration of said trust, the Trustees shall deliver, assign, and transfer by proper instrument or instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to my said son."

(f) The petitioner herein is the Harry Harkness Flagler referred to in the foregoing quotation from Item Seventh of said last will and testament.

(g) Item Ninth of said last will and testament provided as follows:

18 "All the rest, residue, and remainder of my estate whether real or personal and wheresoever situate, including of course all property covered by or included in said trust and not payable out of the same or at the end of said trust and all other property and estate of any and every kind whatsoever, I give, devise and bequeath to my beloved wife, Mary Lily Flagler (formerly Mary Lily Kenan of Wilmington, North Carolina) forever, and I hereby authorize, empower, and direct my said executors and Trustees to pay over and transfer to my said wife at the expiration of said trust all such estate and property. And it is my intention to include in this gift, bequest and devise all accumulations or enlargements of my estate and

property as shall have arisen during the life and operation of said trust; and it is also my intention to include in such devise my summer home at Mamaroneck, in the County of Westchester, state of New York, and my property, Number Twenty-one West Fifty-fifth Street in the City of New York, state and county of New York."

(h) Item Tenth of said last will and testament provided in part as follows:

"For the purpose of the fulfillment and due execution of the above trust I hereby invest my Trustees with full power and authority to execute all such instruments, obligations, assignments or transfers as may be necessary in the cour[illegible] of their business as such Trustees and to renew, refund, and by new obligation to provide for the extension, adjustment and payment of any and all obligations that I may leave outstanding at the time of my decease, to the end that if possible all and any such obligations shall be paid and discharged out of the income of my estate during the continuance of such trust. 20

* * * * * * *

"It is my will and intention, in so far as I am legally able to do so to exempt my Trustees in the matter of investment and reinvestment of any portion of my estate from the limitations as to the classes of securities that may be named in the provisions of the statutes of the State of Florida or of any other state or of the United States in respect to the investment of the proceeds and income of trust estate; the principal object of this exemption being that if any of the various enterprises, companies or corporations referred to above in which I am interested shall require temporary assistance the provisions of such statutes shall not interfere to prevent any loan to or on account of such companies or corporations as in the absence of such statutory restrictions might seem wise or advisable on the part of my said Trustees; it is, however, not my intention that any such assistance shall 21

be extended to any other than the following companies:

"The Florida East Coast Railway Company, and the Florida East Coast Hotel Company."

(i) Item Second of the codicil of said Henry M. Flagler dated April 28, 1904, provided as follows:

"I wish further to say, in explanation of the provision made in Item numbered 'Seventh' of my said last will and testament for my son Harry Harkness Flagler, that in case he should not be living at the time
23 of my death or at the time of the expiration of the trust therein referred to, such expression 'expiration of said trust' to be understood as explained in the Item numbered 'First' of this codicil, then the legacy of shares of capital stock of the Standard Oil Company therein mentioned shall lapse and become a part of the residue of my estate."

(j) Item Third of the codicil of said Henry M. Flagler dated January 8, 1906, provided in part as follows:

"I wish to, and do hereby amend the 'Tenth' Item of my said original will by adding at the end of the first paragraph thereof the following, to wit:

24 "In view of the Florida East Coast Railway Company having determined to extend and being now engaged in extending its railway to the City of Key West, I hereby authorize said trustees to borrow from time to time money in such sums and upon such terms as they may find necessary and deem proper to enable said Florida East Coast Railway Company to make such extension including also the purchase and construction of terminal facilities and rolling stock and other equipment, and every proper purpose incidental to such enterprise, and to pledge so much of the trust properties as may be necessary for the payment of such loans, and to lend on such terms as they may deem proper, such money to said Florida East Coast Railway Company to be used by it for such purposes."

(k) Items First and Second of the codicil of said Henry M. Flagler, dated September 13, 1912, provided as follows:

> "Whereas in my said last will and testament, I have bequeathed to my son, and to his children, in the manner described and provided for in my said last will and testament, certain shares of Standard Oil stocks, therein more particularly designated and described, and whereas since the time of the making, publishing and declaring of my said last will and testament, certain changes in the form of said shares and the rights thereunder have taken place, by reason of which some uncertainty might arise as to my intentions in relation to the said bequests.
>
> "Now to obviate any uncertainty relating thereto, I do hereby declare it to have been, and still to be my intention to include by the term of shares of Standard Oil stocks, in my said last will and testament the said shares, or such other shares of stock, property and rights as have been, or may hereafter be issued to or received in the place and stead of said shares of Standard Oil stocks as the same existed at the time of the making of my last will and testament, excepting therefrom, however, such subscription rights under said stock or arising from the owership thereof, as I have heretofore or may hereafter exercise and pay for.
>
> "It is my will that the legacy and bequest, to my son, be void and lapse, if my said son should die before me, and in that event, the legacy and bequest, to him, shall become and be part of my residuary estate."

(l) Pursuant to the provisions of Item Fifth of said last will and testament said trustees elected to continue said trust beyond the end of five years from the time of the death of said Henry M. Flagler and said trust did continue for a period of ten years from the time of the death of said Henry M. Flagler and terminated on May 20, 1923.

(m) On or about April 26, 1921, said Trustees delivered, assigned and transferred to the petitioner 10,000 ordinary

shares of the stock of Anglo-American Oil Company, Limited, the fair market value of which on such date was $18.75 per share. In 1925 the petitioner received a stock dividend of 3,333 ordinary shares of the stock of Anglo-American Oil Company, Limited, in respect of said 10,000 ordinary shares. On or about January 31, 1930, such 13,333 ordinary shares were exchanged for 2,400 shares of the preferred stock of Standard Oil Export Corporation.

(n) In December, 1934, the petitioner sold 500 of said 2,400 shares of the preferred stock of Standard Oil Export
29 Corporation, for which he received the net amount of $54,962.50.

(o) The tax basis of said 500 shares of the preferred stock of Standard Oil Export Corporation based upon said fair market value of April 26, 1921, of $18.75 per share of the ordinary shares of Anglo-American Oil Company, Limited was $39,062.50.

(p) On or about May 20, 1923, said Trustees delivered, assigned and transferred to the petitioner 5,000 ordinary shares of the stock of Anglo-American Oil Company, Limited the fair market value of which on such date was $15.375
30 per share. In 1925 the petitioner received a stock dividend of 1,667 ordinary shares of the stock of Anglo-American Oil Company, Limited in respect of said 5,000 ordinary shares. On or about January 31, 1930, such 6,667 ordinary shares were exchanged for 1,200 shares of the preferred stock of Standard Oil Export Corporation.

(q) In May, 1936, the petitioner sold 1,196 of said 2,400 shares of the preferred stock of Standard Oil Export Corporation and said 1,200 shares of the preferred stock of Standard Oil Export Corporation together with 36 such shares not involved in this proceeding, for all which 2,432 shares he received the net amount of $272,228.50.

31

(r) The tax basis of said 36 shares of the preferred stock of Standard Oil Export Corporation is not questioned in this proceeding and was $1,287.50. The tax basis of said 1,196 shares of the preferred stock of Standard Oil Export Corporation based upon said fair market value of April 26, 1921, of $18.75 per share of the ordinary shares of Anglo-American Oil Company, Limited was $93,437.50. The tax basis of said 1,200 shares of the preferred stock of Standard Oil Export Corporation based upon said fair market value of May 20, 1923, of $15.375 per share of the ordinary shares of Anglo-American Oil Company, was $76,875.00. The aggregate tax basis of said 2,432 shares on the foregoing basis was $171,600,00.

32

WHEREFORE, the petitioner prays that this Board may hear the proceeding, redetermine the deficiency alleged in said notice of deficiency, determine that the petitioner has made an overpayment of tax in respect of the taxable years herein involved, and grant such other and further relief as the Board shall deem proper.

JOSEPH C. WHITE,
15 Broad Street,
New York, N. Y.
Counsel for Petitioner.

33

STATE OF NEW YORK,
COUNTY OF } ss.:

HARRY HARKNESS FLAGLER being duly sworn deposes and says:

That he is the petitioner above named; that he has read the foregoing petition or had the same read to him and is familiar with the statements contained therein; and that the

34 *Exhibit A*

statements contained herein are true except those stated to be on information and belief and that those he believes to be true.

(S) HARRY HARKNESS FLAGLER

Subscribed and sworn to before me
this 21st day of November, 1938.

(S) WALTER F. HAIGHT
Notary Public
Commission expires March 30, 1939

35 (Seal)

EXHIBIT A

Letterhead of

TREASURY DEPARTMENT

Aug. 25, 1938

IT:A:1
JMF:90D

36 Mr. Harry Harkness Flagler,
32 Park Avenue,
New York, New York.

Sir:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934 and 1936 discloses a deficiency of $20,687.23 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Exhibit A

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By W. T. SHERWOOD
Acting Deputy Commissioner

Enclosure:

Statement
Form of waiver

40

STATEMENT

IT:A:1
JMF:90D

Mr. Harry Harkness Flagler,
32 Park Avenue,
New York, New York

Tax Liability for Taxable Years Ended
December 31, 1934 and 1936
Income Tax

Year	*Liability*	*Assessed*	*Deficiency*
41 1934	$93,094.65	$90,178.08	$2,916.57
1936	226,741.70	208,971.04	17,770.66
Totals	$319,836.35	$299,149.12	$20,687.23

In making this determination of your income tax liability careful consideration has been given to the reports of examinations dated March 25, 1938; to your protest dated May 2, 1938 and to the statements made at the conference held on June 24, 1938.

A copy of this letter and enclosures has been mailed to your representative Mr. Joseph C. White, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

42

1934

Adjustments to Net Income

Income as disclosed by return	$220,433.49
Unallowable deductions and additional income:	
(a) Capital gain	6,354.17
Total	$226,787.66
Nontaxable income and additional deductions:	
(b) Contributions	953.12
Net income adjusted	$225,834.54

Statement

Explanation of Adjustments

(a) The facts show that you received 10,000 shares Anglo-American Oil stock plus a stock dividend of 33⅓ percent making a total of 13,333 shares having a cost basis to the decedent of $6.4375 per share. This stock was exchanged in 1930 on the basis of 5⅝ shares for one share of Standard Oil Export Preferred stock resulting in 2,400 shares with a basis of $35.7638 per share, or a total value of $85,833.33. Inasmuch as the correct cost basis of 500 shares preferred stock of Standard Oil Export Preferred stock sold is $17,881.94 instead of $39,062.50, the fair market value at date of distribution as reported, there is an increase in capital gain of $21,180.56. Since the original stock was held more than ten years the increase in taxable gain is 30 percent of this amount or $6,354.17. Section 113(a)(5) of the Revenue Act of 1934 provides as follows:

> "Property Transmitted at Death—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition * * *."

The term acquisiiton is defined in article 113(a)(5) as, "* * * the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property." The basis for computation of gain or loss upon sale of the stock in question is therefore held to be the fair market value as at date of death of decedent.

(b) In view of the increase in income the deduction for charitable contributions has been increased to 15 percent of the net income without the benefit of this deduction in accordance with section 23(o) of the Revenue Act of 1934.

46 *Statement*

Computation of Tax

Net income adjusted		$225,834.54
Less:		
Personal exemption		2,500.00
Surtax net income		$223,334.54
Less:		
47 Dividends	$299,656.51	
Interest on United States obligations	212.50	
Earned income credit (10% of $3,000.00)	300.00	300,169.01
Balance subject to normal tax		None
Surtax on $223,334.54		$ 93,100.65
Less:		
Income tax paid at source		6.00
Income tax liability		$ 93,094.65
Tax previously assessed, account #200426		90,178.08
48 Deficiency		$ 2,916.57

1936

Adjustment to Net Income

Net income as disclosed by return	$365,532.20
Unallowable deductions and additional income:	
(a) Capital gain	25,386.67
Net income adjusted	$390,918.87

Statement 49

Explanation of Adjustment

(a) The increase in capital gain is caused by using as the cost basis for 2,432 shares Standard Oil Export Preferred stock the fair market value as at date of death May 20, 1913, of the original for purpose of sale instead of a value of $171,600.00 as at May 20, 1923, date of distribution. The adjustment is made in accordance with the provisions of the Revenue Act of 1936, under the authority explained in detail above with respect to the Revenue Act of 1934 as applied to the taxable year ending December 31, 1934. 50

Computation of Tax

Net income adjusted		$390,918.87
Less:		
Personal exemption		1,250.00
Surtax net income		$389,668.87
Less:		
Interest on United States obligations	$212.50	
Earned income credit (10% of $3,000.00)	300.00	512.50 51
Balance subject to normal tax		$389,156.37
Normal tax at 4% on $389,156.37		$ 15,566.25
Surtax on $389,668.87		211,181.45
Total tax		$226,747.70
Less:		
Income tax paid at source		6.00
Income tax liability		$226,741.70
Tax previously assessed, account #201605		208,971.04
Deficiency		$ 17,770.66

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Answer

UNITED STATES BOARD OF TAX APPEALS

MR. HARRY HARKNESS FLAGLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

53

Docket No. 96235.

The respondent, by his attorney, J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, for answer to the petition heretofore filed in this proceeding, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1 of the petition.

2. Admits the allegations contained in Paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes
54 for the years 1934 and 1936 but denies that the full amount proposed in the deficiency letter is in controversy.

4. Denies the allegations of error contained in Paragraph 4 of the petition.

5. (a) Admits the allegations contained in sub-paragraph (a) of Paragraph 5 of the petition.

(b) Admits the allegations contained in sub-paragraph (b) of Paragraph 5 of the petition.

(c) Admits the allegations contained in sub-paragraph (c) of Paragraph 5 of the petition.

(d) Admits the allegations contained in sub-paragraph (d) of Paragraph 5 of the petition.

(e) Admits the allegations contained in sub-paragraph (e) of Paragraph 5 of the petition.

(f) Admits the allegations contained in sub-paragraph (f) of Paragraph 5 of the petition.

(g) Admits the allegations contained in sub-paragraph (g) of Paragraph 5 of the petition.

(h) Admits the allegations contained in sub-paragraph (h) of Paragraph 5 of the petition.

(i) Admits the allegations contained in sub-paragraph (i) of Paragraph 5 of the petition.

(j) Admits the allegations contained in sub-paragraph (j) of Paragraph 5 of the petition.

(k) Admits the allegations contained in sub-paragraph (k) of Paragraph 5 of the petition.

(l) Denies the allegations contained in sub-paragraph (l) of Paragraph 5 of the petition.

(m) Admits that on or about April 26, 1921 there were delivered to petitioner 10,000 ordinary shares of stock of Anglo-American Oil Company, Ltd.; admits that thereafter petitioner received a stock dividend of 3,333 ordinary shares of stock of Anglo-American Oil Company, Ltd.; admits that in 1930 all of said 13,333 ordinary shares of Anglo-American Oil Company stock was exchanged for 2,400 shares of preferred stock of Standard Oil Export Corporation; denies the remaining allegations contained in sub-paragraph (m) of Paragraph 5 of the petition.

(n) Admits the allegations contained in sub-paragraph (n) of Paragraph 5 of the petition.

(o) Denies the allegations contained in sub-paragraph (o) of Paragraph 5 of the petition.

58 *Answer*

(p) Admits that on or about April 20, 1923. there was delivered to petitioner 5,000 ordinary shares of stock of Anglo-American Oil Company, Ltd.; admits that thereafter petitioner received a stock dividend on said stock of 1,667 shares of Anglo-American Oil Company stock. Admits that in 1930 all of said 6,667 shares of Anglo-American Oil Company stock was exchanged for 1,200 shares of preferred stock of Standard Oil Export Corporation; denies the remaining allegations contained in sub-paragraph (p) of Paragraph 5 of the petition.

59 (q) Admits and alleges that in May, 1936, petitioner sold 2,432 shares of Standard Oil Export Corporation stock acquired from the estate of Henry M. Flagler, the total selling price being $272,228.50. Denies the remaining allegations of sub-paragraph (q) of Paragraph 5 of the petition.

(r) Denies the allegations contained in sub-paragraph (r) of Paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

WHEREFORE, it is prayed that the appeal be denied.

60

Signed J. P. WENCHEL, ECA.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

E. G. HANSON,
Division Counsel.

GEORGE R. SHERRIFF,
Special Attorney,
Bureau of Internal Revenue.

G.R.S./rg 1/13/39

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Stipulation of Facts

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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It is hereby stipulated and agreed by and between the Petitioner and the Respondent by their respective attorneys of record that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. The Petitioner is an individual with residence at Millbrook, Dutchess County, New York. The returns for the periods here involved were filed with the Collector of Internal Revenue for the Fourteenth District of New York. 68

2. On May 20, 1913, one Henry M. Flagler (hereinafter called the Testator), a resident of St. Johns County, Florida, died testate, leaving a last will and testament dated February 1, 1902, and seven codicils dated, respectively, February 17, 1903; April 28, 1904; January 8, 1906; April 7, 1908; December 22, 1910; January 10, 1912; and September 13, 1912; which said last will and testament and codicils thereto were duly admitted to probate in the Court of County Judge in and for St. Johns County, Florida, on May 24, 1913. A copy of said last will and testament and codicils thereto, together with the probate proceedings thereon, marked Exhibit A, is attached hereto and made a part hereof.

64 *Stipulation of Facts*

3. Pursuant to Items Third and Fifth of said last will and testament, a trust was created covering substantially the whole of the estate of the Testator, including stock of Anglo-American Oil Company, Limited, hereinafter referred to.

4. By Item Fifth of said last will and testament, said trust was to continue for a term of five years from the time of the death of the Testator, and for an additional term not exceeding five years if the Testator's Florida properties
65 should be in such condition as "to require financial aid from someone outside of themselves * * *."

5. Pursuant to the provisions of Item Fifth of said last will and testament, said trust did continue for a period of ten years from the time of the death of the Testator and terminated on May 20, 1923.

6. The Petitioner, Harry Harkness Flagler, was the only son of the Testator, and is the individual referred to in said last will and testament and codicils thereto as Harry Harkness Flagler and "my son" or "my said son."

66 7. Item Seventh of said last will and testament provided in part as follows:

> "At the expiration of said trust, the Trustees shall deliver, assign, and transfer by proper instrument or instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to my said son."

Items First of the codicil of September 13, 1912, provided that said shares of Standard Oil Stock should include any property issued or received in its place and stead.

8. Pursuant to the decree of the Circuit Court, Eastern District of Missouri, in the case of *U. S.* v. *Standard Oil Co. N. J. et al.*, 173 Fed. 177 (1909), and affirmed with modifications by the Supreme Court of the United States, in the case of *The Standard Oil Company of New Jersey* v. *The United States*, 221 U. S. 1, providing for the disintegration of the Standard Oil Co. of New Jersey, there was issued to and received by the stockholders of said Standard Oil Co. of New Jersey one ordinary share of the stock of Anglo-American Oil Company, Limited, for each share held of the stock of Standard Oil Co. of New Jersey.

9. Said trustees under the will of the Testator received, among other things, 15,000 shares of the stock of Anglo-American Oil Company, Limited, which shares are involved in this proceeding, as follows:

(a) Five thousand of said shares were received, with others, by said trustees as of the date of death of the Testator, namely, May 20, 1913;

(b) On November 26, 1913, after the estate of the Testator was in the hands of said trustees, a 100% stock dividend was declared by the Anglo-American Oil Company, Limited. Said trustees accordingly received as a stock dividend, on December 3, 1913, 5,000 additional ordinary shares of said stock;

(c) In February, 1918, the shareholders of Anglo-American Oil Company, Limited, were given rights to subscribe for additional shares of the ordinary stock of said Company. In the exercise of said rights 5,000 shares were subscribed for by said trustees at $7.50 per share. Those 5,000 shares were received by said trustees on May 1, 1918.

10. (a) The trustees, on April 26, 1921, determined that it was no longer necessary to hold 10,000 ordinary shares of

70 *Stipulation of Facts*

the stock of Anglo-American Oil Company, Limited, as part of the corpus of said trust. On April 26, 1921, sa trustees delivered, assigned and transferred to the Petition 10,000 ordinary shares of the stock of Anglo-American Company, Limited. Said 10,000 shares were a part of t 15,000 ordinary shares of the stock of Anglo-American Company, Limited, described in paragraph 9 hereof.

(b) In 1925, the Petitioner received a stock dividend 3,333 ordinary shares of stock of Anglo-American Oil Co pany, Limited, in respect of said 10,000 ordinary shares.

71 (c) On or about January 31, 1930, such 13,333 ordina shares were exchanged, in a tax-free reorganization, 2,400 shares of the preferred stock of Standard Oil Exp Corporation (5% shares of Anglo-American Oil Compa Limited, stock for one share of preferred stock of Standa Oil Export Corporation).

(d) In December, 1934, the Petitioner sold 500 of sa 2,400 shares of the preferred stock of Standard Oil Exp Corporation, for which he received the net amount $54,962.50.

72 11. (a) Subsequent to May 20, 1923, but as of that da said trustees transferred to the Petitioner, pursuant to provisions of said last will and testament and codicils, amo other things, 5,000 ordinary shares of the stock of Ang American Oil Company, Limited, which had theretofore be held by said trustees in trust as aforesaid. Said 5,000 sha were the remainder of the 15,000 ordinary shares of the st of Anglo-American Oil Company, Limited, described in pa graph 9 hereof.

(b) In 1925, the Petitioner received a stock dividend 1,667 ordinary shares of the stock of Anglo-American Company, Limited, in respect of said 5,000 ordinary sha

(c) On or about January 31, 1930, such 6,667 ordinary shares were exchanged in a tax-free reorganization for 1,200 shares of the preferred stock of Standard Oil Export Corporation (5⅝ shares of Anglo-American Oil Company, Limited, stock for one share of preferred stock of Standard Oil Export Corporation).

12. In May, 1936, the Petitioner sold 2,432 shares of the preferred stock of Standard Oil Export Corporation, for which he received the net amount of $272,228.50. Said shares had been acquired as follows:

(a) One thousand one hundred ninety-six of said shares were a part of said 2,400 shares received in exchange for said 10,000 ordinary shares of the stock of Anglo-American Oil Company, Limited (plus the stock dividend of 3,333 ordinary shares declared thereon), received by the Petitioner on or about April 26, 1921;

(b) One thousand two hundred of said shares had been acquired in exchange for the 5,000 ordinary shares of the stock of Anglo-American Oil Company, Limited (plus the stock dividend of 1,667 shares declared thereon), received by the Petitioner as of May 20, 1923;

(c) Thirty-six of said shares are not involved in this proceeding. The tax basis of said 36 shares was $1,287.50.

13. The market value of the ordinary shares of the stock of Anglo-American Oil Company, Limited, as of April 26, 1921, was $18.75 per share.

14. The market value of the ordinary shares of the stock of Anglo-American Oil Company, Limited, on May 20, 1923, was $15.25 per share.

Exhibit A

15. The market value on May 20, 1913, for the ordinary shares of the stock of Anglo-American Oil Company, Limited, was $18.25 per share.

Dated, New York, N. Y., November 13, 1939.

JOSEPH C. WHITE
Attorney for Petitioner

J. P. WENCHEL
ECA
Attorney for Respondent

EXHIBIT A

Certified Copy of

LAST WILL AND TESTAMENT

WITH CODICILS THERETO

of

HENRY M. FLAGLER,

Deceased

Omitted in this record pursuant to order printed at pp. 44-46 herein. Printed in the record of *Mary Flagler Cary* v. *Commissioner of Internal Revenue* at pp. 22-74.

Memorandum Opinion

UNITED STATES BOARD OF TAX APPEALS

HARRY HARKNESS FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 96235.

Joseph C. White, Esq., for the petitioner.

John R. Wheeler, Esq., for the respondent.

MURDOCK: The Commissioner determined deficiencies of $2,916.57 and $17,770.66 in the petitioner's income tax for the calendar years 1934 and 1936. The facts have been stipulated and the Board adopts the stipulation as its findings of fact. The petitioner sold 500 shares of preferred stock of Standard Oil Export Corporation in 1934 and he sold 1,196 shares of the same kind of stock in 1936. The only issue for decision is whether his basis for gain or loss on those shares is the fair market value of predecessor stock on the date of the death of Henry M. Flagler, from whom he acquired the stock by will, or the fair market value of the predecessor stock when shares were distributed to him by the trustees under the will. The Commissioner has determined that the fair market value of the predecessor stock on the date of the death of the testator is the proper date. The Board has heretofore decided the point in accordance with the Commissioner's present contention on two occasions. *Elizabeth G. Augustus*, 40 B. T. A. 1200; *Richard J. Reynolds*, 41 B. T. A. 59. Although the author of the present opinion was of a

82 *Decision*

different view from the majority of the Board in those cases, nevertheless the Board here follows its prior opinions.

Decision will be entered for the respondent.

Enter:

ENTERED MAY 31, 1940

Decision

83 UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 96235

HARRY HARKNESS FLAGLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

84 Pursuant to the determination of the Board, as set forth in its Memorandum Opinion, entered May 31, 1940, it is

ORDERED AND DECIDED: That there are deficiencies in income tax for the years 1934 and 1936, in the respective amounts of $2,916.57 and $17,770.66.

Enter:

(Signed) J. E. MURDOCK
Member.

Entered May 31, 1940

85

Petition for Review of Decision of the United States Board of Tax Appeals

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B. T. A. Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, 86

Respondent.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Harry Harkness Flagler, the Petitioner herein, a citizen of the United States and of the State of New York and with residence at Millbrook, Dutchess County, New York, and in support of this his petition filed in pursuance of Section 1142 of the Internal Revenue Code for the review of the order and decision, hereinafter described, of the United States Board of Tax Appeals rendered on May 31, 1940, respectfully shows to this Honorable Court as follows: 87

I. STATEMENT OF THE NATURE OF THE CONTROVERSY.

1. On August 25, 1938, the Commissioner of Internal Revenue, the Respondent herein, mailed to the Petitioner by registered mail a notice of the determination of an asserted deficiency in income tax for the calendar years 1934 and 1936 in the total amount of $20,687.23. On November 23, 1938, the Petitioner duly filed with the United States Board of Tax Appeals (hereinafter called the Board) a petition for the redetermination of said asserted deficiency.

88 *Petition for Review of Decision of the United States Board of Tax Appeals*

2. Said asserted deficiency in income tax claimed by the Respondent to be due from the Petitioner resulted from the use by the Respondent, in computing basis and gain on the sales by the Petitioner in 1934 and 1936 of certain stock, of the fair market value as of May 20, 1913, of certain predecessor stock.

3. On May 20, 1913, one Henry M. Flagler (hereinafter called the Testator), a resident of St. Johns County, Florida, died testate, leaving a last will and testament dated Feb-
89 ruary 1, 1902, with seven codicils thereto. By said will, a trust was created to continue for a term of five years from the time of the death of the Testator and for an additional term not exceeding five years if the Testator's Florida properties should be in such a condition as "to require financial aid from someone outside of themselves * * *." Pursuant to this provision, this trust did continue for the full additional term and terminated on May 20, 1923.

4. By the terms of said Last Will and Testament and of the Codicils thereto, the Petitioner became entitled to receive and by the act of the Trustees under said Will and Codicils did receive from said Trustees on April 26, 1921,
90 10,000 ordinary shares of the stock of Anglo-American Oil Company, Limited.

5. By the terms of said Last Will and Testament and of the Codicils thereto the Petitioner became entitled to receive and did receive from said Trustees subsequent to May 20, 1923, but as of that date, 5,000 ordinary shares of the stock of Anglo-American Oil Company, Limited.

6. The aggregate of 15,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, received by the Petitioner from said Trustees as set forth in paragraphs 4 and 5 hereof, had been acquired by said Trustees as follows:

91

a. Five thousand of said shares were received with others, by said Trustees from the Estate of the Testator as of the date of his death, namely May 20, 1913.

b. On November 26, 1913, after said Estate was in the hands of said Trustees, a 100% stock dividend was declared by Anglo-American Oil Company, Limited. Said Trustees accordingly received as a stock dividend on December 3, 1913, 5,000 additional ordinary shares of said stock.

c. In February, 1918, the shareholders of Anglo-American Oil Company, Limited, were given rights to subscribe for additional ordinary shares of said stock. In the exercise of said rights 5,000 shares were subscribed for by said Trustees at a cost of $7.50 per share. Those 5,000 shares were received by said Trustees on May 1, 1918.

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7. After a stock dividend in 1925 which increased Petitioner's holdings of the ordinary shares of the stock of Anglo-American Oil Company, Limited, from 15,000 to 20,000 shares, the Petitioner in a tax-free reorganization in 1930 exchanged said 20,000 ordinary shares for 3,600 shares of the preferred stock of Standard Oil Export Corporation.

8. In December, 1934, the Petitioner sold 500 shares of the preferred stock of Standard Oil Export Corporation. In May, 1936, the Petitioner sold 2,432 shares of said stock, of which 2,396 shares are involved in this proceeding.

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9. The basis of the 500 shares of the preferred stock of Standard Oil Export Corporation so sold by the Petitioner in December, 1934, is to be determined by reference to the 10,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, received by the Petitioner as described in paragraph 4 hereof and the basis of the 2,396 shares of

94 *Petition for Review of Decision of the United States Board of Tax Appeals*

said preferred stock so sold in May, 1936, is to be determined as to 1,196 thereof by reference to said 10,000 ordinary shares and as to 1,200 thereof by reference to the 5,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, received by the Petitioner as described in paragraph 5 hereof.

10. The Petitioner contended in his appeal before the Board that the basis for the computation of gain or loss under Section 113(a)(5) of the Revenue Acts of 1934 and
95 1936 on the sale of the Standard Oil Export Corporation preferred stock sold by him in 1934 and 1936 was the fair market values, respectively, of the predecessor stock on April 26, 1921, and May 20, 1923, the dates when the Petitioner first obtained possession, control, enjoyment, and substantial ownership of said predecessor stock.

11. The Respondent contended that the basis for the computation of gain or loss on said sales of said Standard Oil Export Corporation preferred stock was the fair market value of the predecessor stock on May 20, 1913, the date of death of the Testator.

96 12. On May 31, 1940, the Board promulgated its memorandum findings of fact and opinion wherein it decided in accordance with the contention of the Respondent that the basis for the computation of gain or loss was the fair market value on the date of death of the Testator.

13. On May 31, 1940, the Board rendered, and entered in its records, an order and decision in accordance with its said opinion whereby it ordered and decided that there are deficiencies in income tax of the Petitioner for the years 1934 and 1936 in the respective amounts of $2,916.57 and $17,770.66.

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II. DECLARATION OF THE COURT IN WHICH THE REVIEW IS SOUGHT.

The Petitioner, feeling aggrieved by said order and decision, hereby petitions for the review thereof by the United States Circuit Court of Appeals for the Second Circuit, in which Circuit is located the office of the Collector of Internal Revenue to which were made the returns in respect of which the liability involved in the appeal arises.

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III. ASSIGNMENTS OF ERRORS.

The Petitioner as a basis for the review of said order and decision makes the following assignments of errors:

1. The Board erred in that it decided and held that in determining the basis of the Petitioner for the computation of gain or loss on the sales in 1934 and 1936 of the preferred stock of Standard Oil Export Corporation there should be used the fair market value of the predecessor stock on the date of death of said Henry M. Flagler under the will of whom he acquired the predecessor stock.

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2. The Board erred in that it did not decide and hold that the basis of the Petitioner for the computation of gain or loss on the sales in 1934 and 1936 of the preferred stock of Standard Oil Export Corporation was the fair market value of the predecessor stock on the respective dates when the Petitioner received, or became entitled to receive, said predecessor stock from the testamentary trustees under the will of said Henry M. Flagler.

3. The Board erred in that it did not decide and hold that under Section 113(a) (5) of the Revenue Act of 1934 the

100 basis for the computation of gain or loss upon the sale in 1934 by petitioner of 500 shares of preferred stock of Standard Oil Export Corporation is the fair market value on April 26, 1921, of its predecessor stock, which was transferred on that date to the Petitioner by the testamentary trustees under the will of said Henry M. Flagler.

4. The Board erred in that it decided and held that in determining the aforesaid basis there should be used the fair market value of predecessor stock on May 20, 1913, the date
101 of death of said Henry M. Flagler.

5. The Board erred in that it did not decide and hold that under Section 113(a)(5) of the Revenue Act of 1936 the basis for the computation of gain or loss upon the sale in 1936 by the Petitioner of 1,196 shares of preferred stock of Standard Oil Export Corporation is the fair market value on April 26, 1921, of its predecessor stock, which was transferred on that date to the Petitioner by said testamentary trustees.

6. The Board erred in that it did not decide and hold that
102 under Section 113(a)(5) of the Revenue Act of 1936 the basis for the computation of gain or loss upon the sale in 1936 by the Petitioner of 1,200 shares of preferred stock of Standard Oil Export Corporation is the fair market value on May 20, 1923, of its predecessor stock, on which date the testamentary trust created under the will of said Henry M. Flagler terminated, and as of which date the Petitioner received said predecessor stock.

7. The Board erred in that it decided and held that in determining the basis of said 2,396 shares of preferred stock of Standard Oil Export Corporation sold in 1936 there should

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be used the fair market value of the predecessor stock on May 20, 1913, the date of death of said Henry M. Flagler.

8. The Board erred in that it did not decide and hold that under Section 113(a)(5) of the Revenue Acts of 1934 and 1936 the "time of * * * acquisition" of the property involved in this proceeding and acquired by the Petitioner by bequest is the date upon which he obtained possession, enjoyment, control, and substantial ownership of such property.

9. The Board erred in that it decided and held that under Section 113(a)(5) of the Revenue Acts of 1934 and 1936 the "time of * * * acquisition" of the property involved in this proceeding was May 20, 1913.

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10. The Board erred in that it decided that "time of such acquisition," as used in Section 113(a)(5) of the Revenue Acts of 1934 and 1936, means the date of death of the decedent as to all property acquired from the decedent "by bequest, devise, or inheritance," regardless of whether title to the property thus acquired as of the date of death of decedent was contingent or vested.

11. The Board erred in that it did not decide and hold that the Petitioner first acquired possession, enjoyment, control, and substantial ownership of the property involved in this proceeding on April 26, 1921, and May 20, 1923, the effective dates of the transfers to the Petitioner by the testamentary trustees.

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12. The Board erred in that it did not decide and hold that the bequest to the Petitioner was contingent and did not vest in him until the predecessor stock was distributed to him by said testamentary trustees or until he was entitled to receive such predecessor stock on the termination of the trust created by the will of said Henry M. Flagler.

106 *Petition for Review of Decision of the United States Board of Tax Appeals*

13. The Board erred in that it did not decide and hold that there were no deficiencies due by the Petitioner in respect to his income tax for the calendar years 1934 and 1936.

14. The Board erred in that it decided and held that there were deficiencies in income tax of the Petitioner for the calendar year 1934 in the amount of $2,916.57 and the calendar year 1936 in the amount of $17,770.66.

15. The Board erred in deciding and holding contrary
107 to the law.

16. The Board erred in deciding and holding contrary to the evidence.

WHEREFORE, your Petitioner prays that said decision and order of the Board be reviewed and reversed by the United States Circuit Court of Appeals for the Second Circuit in accordance with law and for such other and further relief as said Court may deem meet and proper in the premises.

HARRY HARKNESS FLAGLER,
Petitioner,

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By JOSEPH C. WHITE
Joseph C. White,
Attorney of Record for Petitioner.

Petition for Review of Decision of the United States Board of Tax Appeals 109

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

JOSEPH C. WHITE, being first duly sworn, deposes and says that he is the attorney of record for Harry Harkness Flagler, the petitioner herein, and as such is duly authorized to verify the above petition for review; that he has read said petition; that the facts therein set forth are true to the best of his knowledge, information and belief; and that said petition is filed in good faith.

110

JOSEPH C. WHITE

Subscribed and sworn to before me
this 23rd day of August, 1940.

JOHN C. BARNWELL

John C. Barnwell,
Notary Public, Bronx County
Bronx Co. Clk's No. 266, Reg. No. 279B41
Certificates Filed in
N. Y. Co. Clk's No. 1467, Reg. No. 1B870
Kings Co. Clk's No. 137 Reg. No. 1536 111
Commission Expires March 30, 1941

[NOTARIAL SEAL]

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Notice of Filing Petition for Review

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B. T. A. Docket No. 96235

HARRY HARKNESS FLAGLER,
Petitioner,

v.

113 COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To:

Guy T. Helvering, Esq.,
Commissioner of Internal Revenue,
Washington, D. C.

Sir:

PLEASE TAKE NOTICE that on the 27th day of August, 1940, Harry Harkness Flagler, the petitioner in the above-entitled proceeding, filed with the Clerk of the United States Board
114 of Tax Appeals the petition of said petitioner, a copy of which is annexed hereto, for review by the United States Circuit Court of Appeals for the Second Circuit of the order and decision of said Board rendered and entered in its records in the above-entitled proceeding on May 31, 1940.

New York, N. Y., August 27, 1940.

JOSEPH C. WHITE
Attorney for the Petitioner,
15 Broad Street,
New York, N. Y.

ADMISSION OF SERVICE

115

Receipt of the foregoing notice of filing of petition for review and service of a copy of the petition therein mentioned is acknowledged this 27th day of August, 1940.

J. P. WENCHEL
John P. Wenchel
Chief Counsel for the Bureau
of Internal Revenue,
Attorney for the Respondent

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Praecipe for Record

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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To the Clerk of the United States Board of Tax Appeals:

As required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit, please prepare and within sixty days from August , 1940, the date on which the petition for the review by said Court of the decision and order rendered by the United States Board of Tax Appeals (hereinafter referred to as the Board) in the above-entitled proceeding was filed with you and on which a copy of said petition with notice that it had been been so filed was

120 served upon the respondent in said proceeding, transmit and deliver to the Clerk of said Court copies duly certified as correct of the following documents:

1. The Docket entries of the proceedings before the Board in the above-entitled proceeding:

2. The petition, together with exhibit thereto, in said proceeding for redetermination of the deficiency of income tax;

3. The answer of the respondent in said proceeding;

4. The stipulation of facts and exhibit thereto introduced at the hearing;

5. The memorandum findings of fact and opinion entered May 31, 1940;

6. The order and decision of the Board entered in its records May 31, 1940;

7. The petition for the review of said decision by the United States Circuit Court of Appeals for the Second Circuit; 122

8. The notice of the filing of said petition with the Clerk of the Board and the admission of the service thereof on the respondent in said proceeding;

9. Stipulation and Order in lieu of printing Exhibit A to Stipulation of Facts;

10. This praecipe for record;

11. The notice of the filing of this praecipe for record with the Clerk of the Board and the admission of the service thereof on the respondent in said proceeding. 123

JOSEPH C. WHITE
Joseph C. White,
Attorney for petitioner.

New York, N. Y., August , 1940.

124 **Notice of Filing of Praecipe for Record**

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96235

HARRY HARKNESS FLAGLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

125 To:

JOHN P. WENCHEL, Esq.,
Chief Counsel for the Bureau of Internal Revenue,
Attorney for the Respondent,
Washington, D. C.

Sir:

PLEASE TAKE NOTICE that on the 27th day of August, 1940, the undersigned attorney for the petitioner in the above-entitled proceeding has filed with the Clerk of the United States Board of Tax Appeals the praecipe for record, of which a copy is annexed hereto.

JOSEPH C. WHITE
Attorney for Petitioner

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New York, N. Y.
August 27, 1940.

ADMISSION OF SERVICE

Receipt of the foregoing notice of filing of the Praecipe for Record and service of a copy of the praecipe herein mentioned is acknowledged this 27th day of August, 1940.

J. P. WENCHEL
John P. Wenchel,
Chief Counsel for the
Bureau of Internal Revenue,
Attorney for the Respondent.

Clerk's Certificate

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVNUE,

Respondent.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 112, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of September, 1940.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[SEAL]

130 **Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts**

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B.T.A. Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

131 *against*

COMMISSIONER OF INTERNAL REVENUE,

Respondent;

B.T.A. Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent;

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B.T.A. Docket No. 96236

ESTATE OF ANNIE L. FLAGLER, Deceased, HARRY HARKNESS FLAGLER, Executor,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts 133

B.T.A. Docket No. 96237.

JEAN LOUISE MATTHEWS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION AND ORDER 134

IT IS HEREBY STIPULATED AND AGREED by and between the above-named petitioners, by their attorney of record, Joseph C. White, and the Commissioner of Internal Revenue, by his attorney, Samuel O. Clark, Jr., Assistant Attorney General of the United States, as follows:

The above four cases involve an identical question of law and were consolidated for purposes of the Brief and Argument before the United States Board of Tax Appeals.

Separate stipulations of facts and separate records were made in the United States Board of Tax Appeals in each of the above four cases. A part of the stipulation of facts in 135 each of the above four cases was an exhibit consisting of a certified copy of the Last Will and Testament, with codicils thereto, of Henry M. Flagler. This exhibit is sixty-five mimeographed pages long and the parties hereto agree, in order to avoid unnecessary printing expense, that this exhibit, a part of the stipulation of facts in each of the above four cases before the United States Board of Tax Appeals, may be printed only once, to wit, in the record of the case of *Mary Flagler Cary* v. *Commissioner of Internal Revenue*, which case has the lowest Docket Number in the United States Board of Tax Appeals, when the cases come on for

136 *Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts*

appeal before the United States Circuit Court of Appeals for the Second Circuit. In lieu of the printing of the above-mentioned exhibit in the other three records a copy of this Stipulation and Order will be printed in those records and cross references made to the exhibit printed in the record of the case of *Mary Flagler Cary* v. *Commissioner of Internal Revenue.*

IT IS FURTHER AGREED by and between the parties hereto that the above four cases may be consolidated for purposes
137 of the Brief in the United States Circuit Court of Appeals for the Second Circuit.

JOSEPH C. WHITE
Joseph C. White,
Attorney for Petitioners.

SAMUEL O. CLARK, JR.
Samuel O. Clark, Jr.,
Assistant Attorney General of the United States

So ordered:

138 Dated October 24, 1940.

THOMAS W. SWAN
U. S. C. J.

[fol. 47] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1940

(Argued January 8, 1941. Decided January 17, 1941)

Nos. 145-6-7-8

MARY FLAGLER CARY, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

HARRY HARKNESS FLAGLER, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

HARRY HARKNESS FLAGLER, Executor of Annie L. Flagler, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

[fol. 48] JEAN LOUISE MATTHEWS, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

On appeal from four orders of the Board of Tax Appeals fixing deficiencies in income taxes for the years 1934 and 1936

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Roswell L. Gilpatric for the Petitioners.
Helen R. Carloss for the Respondent.

Per CURIAM:

Orders affirmed on the authority of Van Vranken v. Helvering, 115 Fed. (2) 709 (C. C. A. 2).

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of January one thousand nine hundred and forty-one.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

HARRY HARKNESS FLAGLER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 50] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Harry Harkness Flagler v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 22, 1941. D. E. Roberts, Clerk.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following Nos. 684 and 734.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.